

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

OSTERHAUS PHARMACY, INC. on behalf
of itself and all others similarly situated,

Plaintiff,

v.

CVS HEALTH CORPORATION, CVS
PHARMACY, INC., CAREMARK Rx,
L.L.C. (f/k/a/ CAREMARK Rx, INC.),
CAREMARK, L.L.C., CAREMARKPCS,
L.L.C., CAREMARK PCS HEALTH L.L.C.,
CAREMARK IPA, L.L.C., CAREMARK
PART D SERVICES, LLC, AETNA INC.,
AETNA HEALTH HOLDINGS, LLC, AND
AETNA HEALTH MANAGEMENT, LLC,

Defendants.

NO. 2:23-cv-01500-RSM

**PLAINTIFF'S RESPONSE TO THE
COURT'S MAY 3, 2024 ORDER TO
SHOW CAUSE (ECF NO. 50)**

Osterhaus Pharmacy, Inc. ("Plaintiff") respectfully submits this Response to the Court's May 3, 2024 Order to Show Cause (ECF No. 50). The Court asked Plaintiff to explain "why this case should not be dismissed or transferred under § 1406(a)." *Id.* For the reasons explained below, venue is proper in this Court. As a result, it would be inappropriate to dismiss or transfer this litigation under 28 U.S.C. § 1406(a).

I. VENUE IS PROPER IN THE WESTERN DISTRICT OF WASHINGTON

Venue is proper in the Western District of Washington where Plaintiff brought this lawsuit because the Ninth Circuit permits *nationwide venue* in civil antitrust cases against

1 corporate defendants. *Go-Video Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1413 (9th Cir. 1989).

2 Nationwide venue for antitrust plaintiffs is established by combining two federal statutes:

- 3 • Section 12 of the Clayton Act establishes personal jurisdiction over a corporate
4 defendant in federal antitrust litigation *in any judicial district in the United States*.
5 *Go-Video*, 885 F.2d at 1413 (citing 15 U.S.C. § 22).
- 6 • The general federal venue statute, 28 U.S.C. § 1391, provides that venue is proper *in*
7 *any judicial district in which all corporate defendants are subject to personal*
8 *jurisdiction*. *Markson v. CRST Int'l., Inc.*, 2021 WL 1156863, at *5 (C.D. Cal. Feb.
9 10, 2021) (citing 28 U.S.C. § 1391(b)(1), (c)(2)).
- 10 • The Ninth Circuit permits antitrust plaintiffs to combine these two statutes,
11 establishing proper venue in antitrust cases against corporate defendants in any
12 judicial district in the United States. *Go-Video*, 885 F.2d at 1413, 1417; *Action*
13 *Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1178-80 (9th Cir.
14 2004).

15 **A. Section 12 of the Clayton Act permits nationwide personal jurisdiction in antitrust**
16 **litigation against corporate defendants.**

17 Section 12 of the Clayton Act, the long-arm statute for federal antitrust lawsuits, provides
18 special rules for both venue and personal jurisdiction in antitrust lawsuits against corporate
19 defendants:

20 [1] Any suit, action, or proceeding under the antitrust laws against a
21 corporation may be brought not only in the judicial district whereof it is an
22 inhabitant, but also in any district wherein it may be found or transacts
business; [2] and all process in such cases may be served in the district of
which it is an inhabitant, or wherever it may be found.

23 15 U.S.C. § 22 (bracketed numbers).

24 The second clause in Section 12 authorizes service of process over a corporate defendant
25 “wherever it may be found.” *Id.* This phrase permits nationwide service of process, which in turn
26 authorizes nationwide personal jurisdiction. *Action Embroidery*, 368 F.3d at 1177 (a federal
27 district court has personal jurisdiction over a defendant in any jurisdiction where process can be

1 served on it). Therefore, a corporate antitrust defendant is subject to personal jurisdiction in any
2 judicial district in the United States, subject only to constitutional due process requirements. *Id.*

3 Constitutional due process requirements are satisfied when the relevant forum has
4 sufficient minimum contacts with a defendant. *Id.* at 1180. Because Section 12 authorizes
5 nationwide service of process, the relevant forum for a minimum contacts analysis under Section
6 12 is the United States as a whole. *Go-Video*, 885 F.2d at 1416; *Action Embroidery*, 368 F.3d at
7 1180 (“In a statute providing for nationwide services of process, the inquiry to determine
8 ‘minimum contacts’ is thus ‘whether the defendant has acted within any district of the United
9 States or sufficiently caused foreseeable consequences in this country.’”) (quoting *Securities Inv.*
10 *Prot. Corp. v. Vigman*, 764 F.2d 1309, 1316 (9th Cir. 1985)). Here, defendants are corporations
11 operating within the United States, thus satisfying the liberal national contacts analysis set forth
12 in *Go-Video* and *Action Embroidery*.

13 **B. Venue is proper in any district in which defendants are subject to personal**
14 **jurisdiction.**

15 The general federal venue statute, 28 U.S.C. § 1391, provides that venue in a civil case is
16 proper in any judicial district in which a defendant resides, if all defendants reside in the state in
17 which the district is located. 28 U.S.C. § 1391(b)(1). A corporation is deemed to reside in any
18 jurisdiction in which it is subject to the court’s personal jurisdiction. 28 U.S.C. § 1391(c)(2). *See*
19 *also Markson*, 2021 WL 1156863, at *5 (“[V]enue is proper in a judicial district in which any
20 defendant resides; and a defendant corporation is deemed to reside for purposes of venue in any
21 judicial district in which it ‘is subject to the court’s personal jurisdiction with respect to the civil
22 action in question.’”) (quoting 28 U.S.C. § 1391(b)(1), (c)(2)).

23 As noted above, Defendants here are subject to personal jurisdiction in the Western
24 District of Washington. *Go-Video*, 885 F.2d at 1413 (citing 15 U.S.C. § 22). They therefore
25 reside in the Western District of Washington for purposes of venue. 28 U.S.C. § 1391(c)(2).
26 Venue is thus proper in the Western District of Washington under 28 U.S.C. § 1391(b)(1).
27

1 **C. The Ninth Circuit permits antitrust plaintiffs to combine these statutes to establish**
2 **nationwide venue.**

3 The Ninth Circuit has interpreted the two clauses in Section 12 independently, letting a
4 plaintiff invoke Section 12's nationwide service-of-process provision to establish personal
5 jurisdiction in any judicial district, and combine that provision with the general venue statute, 28
6 U.S. § 1391, to establish proper venue based on personal jurisdiction over each defendant. *Go-*
7 *Video*, 885 F.2d at 1413, 1417; *Action Embroidery*, 368 F.3d at 1178-80.

8 In *Go-Video*, the Ninth Circuit held that venue is proper in federal antitrust suits if the
9 venue requirements of *either* Section 12 *or* 28 U.S. § 1391 are satisfied. 885 F.2d at 1413. In
10 *Action Embroidery*, the Ninth Circuit confirmed that the availability of personal jurisdiction
11 under Section 12 does not depend on the availability of venue under the same statute. 368 F.3d at
12 1178. The result is that under Ninth Circuit law, an antitrust plaintiff may combine the personal
13 jurisdiction clause under Section 12 with the general venue provision, establishing proper venue
14 in antitrust cases involving corporate defendants in any federal district court in the United States.
15 *Action Embroidery*, 368 F.3d at 1178-80; *Go-Video*, 885 F.2d at 1413.

16 **II. DISMISSAL OR TRANSFER UNDER 28 U.S.C. §1406(A) WOULD BE**
17 **IMPROPER.**

18 Section 1406(a) permits dismissal or transfer of a case only if a district court lacks proper
19 venue. 28 U.S.C. § 1406(a) ("The district court of a district in which is filed a case
20 laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice,
21 transfer such case to any district or division in which it could have been brought."); *Atlantic*
22 *Marine Const. Co., Inc. v. United States Dist. Court for Western Dist. of Texas*, 571 U.S. 49, 55
23 (2013) (Section 1406(a) allows dismissal only when venue is wrong or improper). Venue is
24 proper in this Court. Dismissal or transfer of the litigation under §1406(a) would be improper.

1 RESPECTFULLY SUBMITTED AND DATED this 31st day of May, 2024.

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